United States Court of Appeals

for the Second Circuit

APPELLANT'S REPLY BRIEF

74-1077

United States Court of Appeals
FOR THE SECOND CIRCUIT

B

NO. 74-1077

CAPITAL TEMPORARIES, INC. OF HARTFORD,
CAPITAL TEMPORARIES, INC. OF NEW HAVEN,

P/S

and

CONSTANTINE T. ZESSOS,
Plaintiffs and Appellants

vs.

THE OLSTEN CORPORATION,
Defendant and Appellee

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

REPLY BRIEF

To be argued by:
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I

INTRODUCTION

The Brief of the defendant-appellee, The Olsten Corporation, does not come to grips with the basic legal principles operative in the area of Sherman Act Section 1 prohibited activities, and greatly relies on a one-sided interpretation of the factual record which, however appropriate for a jury argument, only lends support to the plaintiffs' claim that summary judgment was improvidently granted.[1] Furthermore, the defendant has not responded to the plaintiffs' discussion of the public policy objectives of our antitrust laws and the economic and social evils which they are intended to prevent.

II

AN ILLEGAL TIE-IN EXISTS IN THE LICENSING AGREEMENT BETWEEN THE PARTIES; THE DEFENDANT'S CONDUCT CORROBORATES THIS TIE-IN.

The defendant discusses tie-ins with only passing reference to the case law on the subject. Its argument essentially rests on the following two contentions: first, the licensing agreement between the parties does not illegally tie the purchase of the Olsten "white collar" franchise to the contemporaneous purchase of the Handy Andy "blue collar" franchise; second, even if one of the essential elements of a tie-in is present, the existence of "economic power", the defendant did not use that economic power in an illegal and coercive manner.

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[1] We mention no further the unnecessary and pejorative statements which appear throughout the defendant's brief and which are unrelated to the merits of this appeal. While prepared to respond point-by-point, we believe such *ad hominem* colloquy has no place in addressing this Court.

A. The Tying Arrangement is Found in The Licensing Agreement Between The Parties.

Olsten does not deny that the licensing agreement comprehends the license of both the Olsten mark and the Handy Andy mark. However, it does attempt to deny they are tied by constructing a dichotomy between a *right* to open a Handy Andy and the *duty* to open an Olsten office (pp. 18-21 of Defendant's Brief). This dichotomy is only of significance if we accept the defendant's claim that the Handy Andy franchise was given Zessos as a pure gift, without strings, to be accepted or rejected by him without reference to the white collar franchise. Patently this was not the case. The two marks and franchises are bound inextricably together throughout the contract, and for each and for both the defendant has exacted its price.

In the agreement, Olsten as franchisor and licensor granted to Zessos as franchisee

> "the exclusive and non-transferable license:
>
> 1. 'to use the trade name and trademark OLSTEN'S . . .'
>
> 2. 'to use the trade name and trademark HANDY ANDY LABOR . . .'
>
> . . . so long as the licensee observes and performs all the terms, covenants and conditions of this agreement." (A. 20)

The contract in fact regarded the grant of the right to use these two trade names and trademarks as a single license to Zessos which would last only so long as he performed all the requirements of the agreement. Even if such requirements pertained to only one of the franchises, failure to perform risked termination of the right to use both marks.

A primary issue in this litigation is the meaning of the "Handy Andy" clause in paragraph 2 of the September 17, 1965 licensing agreement. That paragraph should be read in its entirety:

> "HANDY ANDY
>
> 2. The grant of the license hereunder includes the right of the LICENSEE to use the trade mark and name HANDY ANDY LABOR. All 'blue collar' personnel shall be supplied by a division of the LICENSEE designated as HANDY ANDY LABOR commencing six (6) months from the date hereof. For the purposes of standards and rate of franchise fee, the total of all billings from whatever source shall be included.
>
> The division shall be known as HANDY ANDY LABOR, a division of OLSTEN'S OF GREATER HARTFORD, INC. At the option of the LICENSEE, such division may be operated as a separate corporate entity. In such event, it shall be designated as HANDY ANDY LABOR OF GREATER HARTFORD, INC. In either event, separate bookkeeping shall be kept for the 'blue collar' division. In the event the LICENSEE incorporates, all of the provisions as set forth in paragraph 23 shall apply."

The defendant argues that the use of the word "right" in paragraph 2 somehow converted the grant of an "exclusive and non-transferable license" into a gift. A license, by definition, confers a *right*.[2] In receiving the license to use the Olsten mark (paragraph 1 of the agreement), Zessos received from the plaintiffs the *right* to use it. His *right* to use the defendant's mark Handy Andy, was, by the explicit language of the agreement, included in the license. The grant of this license, which included both the Olsten and Handy Andy marks, originally for Hartford and Middlesex counties, was extended to New Haven county by paragraph 35 of the rider to the agreement "upon the condition that an OLSTEN'S office be opened and in operation within eighteen (18) months". (A. 35)[3]

[2] "The word 'license' means permission, or authority; and a license to do any particular thing, is a permission or authority to do that thing; and if granted by a person having power to grant it, transfers to the grantee the right to do whatever it purports to authorize." *Federal Land Bank v. Kiowa County*, 368 U.S. 146, 154, n. 23, (1961) quoting *Gibbons v. Ogden*, 9 Wheat. 1, 213-214 (1824).

[3] The defendant concedes the plaintiffs fulfilled this condition. (Defendant's Brief at page 9).

However the defendant might attempt to disguise the true nature of the obligation it imposed on Zessos, it is clear that the words "privilege" or "gift" are not used in the agreement to describe the Handy Andy franchise. Were that the actual intent the appropriate language could certainly have been included. Olsten's claim that the Handy Andy license was merely a gift, in view of the $6,000 licensing fee covering both the Handy Andy and the Olsten's franchises, plus the five percent fee levied on Handy Andy gross billings, cannot be sustained. We respectfully submit that this co-mingled license fee, the 5% gross billings levy, and the requirement that Zessos supply *all* blue collar personnel under the Handy Andy mark, each constituted consideration for the Handy Andy license (and for the Olsten license as well), contrary to the District Court's assertion that Zessos "received the right to use the Handy Andy trademark . . . without payment of additional consideration." *Capital Temporaries, Inc. of Hartford v. Olsten Corp.*, 365 F. Supp. 888, 896 (D. Conn. 1973).

As far as each franchise was concerned, Olsten granted a *right* — the right to use a registered trademark; and imposed *duties* — the terms and conditions required of Zessos. Commencing in the second year of the contract, Zessos was required to maintain minimum billing "standards". (Agreement, paragraph 13 at A. 23) These applied to aggregate white and blue collar billings. (Agreement, paragraph 2 at A. 20) The defendant exacted a 5% franchise fee on gross billings. (Agreement, paragraph 4 at A. 21) This rate also applied to both white and blue collar. (Agreement, paragraph 2 at A. 20)

The language used with respect to the Handy Andy grant is totally inconsistent with the defendant's claim on page 29 of its Brief that this grant was a gift which did not preclude Zessos "from operating a non-Olsten blue collar service". Paragraph 2 of the agreement, the "Handy Andy" clause, does not say "*Some* 'blue collar' personnel *may* be supplied . . ."; it says "*All* 'blue collar' personnel *shall* be

supplied . . .". It does not say ". . . commencing no sooner than six (6) months from the date hereof as the licensee at his option may determine"; it says ". . . .commencing six (6) months from the date hereof". (A. 20)

This mandatory language is in sharp contrast to another sentence which appears in this same Handy Andy clause: "At the option of the licensee, such division may be operated as a separate corporate entity." (Id.) Obviously, when Olsten chose to make Zessos' obligations permissive or optional, it was capable of doing so explicitly.

While Olsten contrasts the *right* to open a blue collar franchise with the *duty* to open a white collar franchise in Hartford, it equates in the same sentence that blue collar *right* with the *right* to open a white collar franchise in New Haven. (Defendant's Brief, pp. 15, 20-21) Comparison of the two relevant sections of the agreement, paragraph 2 — the "Handy Andy" clause, and paragraph 35 — the New Haven rider, in fact brings into sharp relief the affirmative requirement to open a Handy Andy, and the foreclosure from other blue collar opportunities. These have no parallel in the New Haven rider and the two cannot be equated. (A. 20, 35)

The language used in these clauses raises the question, if the "Handy Andy" clause merely extended an option, without strings if not accepted, why did Olsten not use option language in that clause as it did in the New Haven ride? If all Olsten intended was to extend an option to start up a Handy Andy franchise, why did it not say this?

The defendant has inaccurately stated at page 21 of its Brief: "The only possible sanction which could be imposed upon Zessos was that, if he elected not to open a blue collar franchise, he would lose the privilege of operating the blue collar franchise." Olsten also contends that no sanctions were available in the event Zessos chose not to supply all "blue collar" personnel "by a division of the licensee designated as Handy Andy Labor" but rather decided to enter

the market for the supplying of blue collar personnel under non-Olsten auspices. (Id. 29) This contention is also incorrect.

Initially, of course, as with any colorable claim for breach of contract, Olsten could resort to common law and equitable remedies for breach of contract, including damages, specific performance, and injunctive relief. In addition, if the licensee failed to meet Olsten's "standards" (applicable to both the Handy Andy and Olsten white collar franchises), or breached the agreement for any other reason, Olsten had its buy-out rights under paragraphs 13 and 21 of the agreement. (A. 23, 26) The non-competitive clause and the restrictive covenant clause both abet and reinforce the tying arrangement with sanctions, including, in the case of the restrictive covenant clause, consent to injunctive relief. (A. 31) Finally, the licensing agreement provides that it terminates in the event the licensee does not perform all the "terms, covenants and conditions of the agreement." (A. 20) Whether Olsten's sword be sheathed or not, these sanctions are sufficient to invoke a reasonable belief that the Handy Andy obligations were binding and enforceable.

Olsten was aware of these sanctions and willing to use them. This is evidenced by Mr. Olsten's statement to Mr. Zessos that a Handy Andy office had to be opened because this requirement was "in" the licensing agreement. (A. 198, 308)

Olsten and the court below found significance in the absence of facts, i.e., the lack of allegations by Zessos that he attempted to operate a non-Handy Andy blue collar business Defendant's Brief, page 11; 365 F. Supp. at 894. To the contrary, this underscores the effectiveness of Olsten's requirement that blue collar personnel be provided *only* through Handy Andy and that Zessos not compete "directly or indirectly" ("best efforts" clause — paragraph 25 at A. 31). The prohibited anti-competitive effect has been obtained.

On page 6 of its Brief, Olsten states as fact "there is no requirement that any franchise operate both (Olsten and Handy Andy franchises)". The source of this statement is the following extract from the affidavit of the defendant's chairman, William Olsten (at A. 76-77):

> " * * *
>
> 25. The Olsten Corporation did not require Constantine T. Zessos to purchase a 'blue collar' franchise in order to obtain a 'white collar' franchise;
>
> 26. The Olsten Corporation has never required any franchisee to purchase a 'blue collar' franchise in order to obtain a 'white collar' franchise;
>
> 27. The Olsten Corporation has allowed a franchisee to operate a Handy Andy ('blue collar') franchise without having to simultaneously operate an Olsten Temporary Services ('white collar') franchise;
>
> 28. The Olsten Corporation has allowed a franchisee to operate an Olsten Temporary Services ('white collar') franchise without having to simultaneously operate a Handy Andy ('blue collar') franchise;
>
> 29. Constantine T. Zessos had no obligation to pay, nor did he pay, any franchise fee for the right to open a 'blue collar' franchise;
>
> * * * "

Obviously, even this self-serving affidavit does not support the statement contained in the defendant's Brief. The affidavit carefully uses the word "purchase" in the context of the payment of a separate initial front end franchise fee. It states that Olsten sometimes "allows" franchisees to operate one franchise without the other. This alleged forebearance by Olsten is hardly evidence of the absence of a tying arrangement. See discussion at pp. 16 and 17 of the plaintiffs' Brief. Moreover, in this case, Olsten has in fact required, by contract, a franchisee to operate a Handy Andy franchise in order to operate a white collar franchise.

It is apparent from the above quoted affidavit that Olsten does not consider the franchise agreement with the plaintiffs

to be unique. In justifying its contract with Zessos on the basis of its overall operation, Olsten in fact indicts its system if the tying arrangement found here is typical of what it has imposed on its other franchisees.

The defendant seems to misconstrue the plaintiffs' argument with regard to the August 1969 amendment to the original agreement. The plaintiffs do not rely on that amendment to establish the existence in the contract of the illegal tying arrangement, contrary to the discussion on page 24 of the defendant's Brief. It is the plaintiffs' claim that the tie-in existed in the original agreement. The 1969 amendment is corroborative of this as well as supportive evidence of the pattern of Olsten's conduct, extrinsic to the contract, requiring the opening of the tied blue collar franchise.

Olsten's claim at page 18 of its Brief that there was no tying arrangement because the rider to the original agreement did not mention a Handy Andy franchise in New Haven is erroneous. The rider "granted the right of the LICENSEE to operate in the County of New Haven". (A. 35) The license included both Olsten and Handy Andy franchises, but was conditioned on opening an Olsten office in New Haven within eighteen months. This is corroborated by the August 1969 amendment which extended the original six-month time limit: "The LICENSEE's time to open Handy Andy offices in Hartford *and* New Haven is extended to December 31, 1969". (Emphasis added) (A. 43, paragraph 2) In connection with the defendant's claim that the original Handy Andy grant constituted an open-ended gift or option, one wonders what rationale supports this extension to December 31, 1969. Olsten's "mandatory minimum" time limit concept would result in an interpretation of the amendment whereby Zessos would be prohibited from opening a Handy Andy until after that date. Contrary to Olsten's argument, the mandatory nature of the original six-month requirement is reaffirmed and updated by the August 1969 amendment.

Olsten's claim that the extension to December 1969 of the original six-month time limit originated with Zessos as a self-imposed limit on a Handy Andy "option" is also incorrect. (Defendant's Brief, page 19) What conceivable reason would Zessos have for restricting an open ended option to establish a Handy Andy office, which according to the defendant, he owned — unless it was not in fact such an option, but rather, a contractual obligation he had not met, placing him in default? The only reasonable purpose for the amendment which comports with the facts and circumstances was to remedy this default by extending the time limit.

The suggestion by the defendant on page 24 of its Brief, than any illegal tying arrangement in the original agreement was rendered "nugatory" by a subsequent supposed "gentlemen's agreement" between Olsten and Zessos is not in accord with settled antitrust law. Lenient administration of an agreement does not cure the restrictive effect on competition of a contract which violates the antitrust laws. See *Advance Business Systems and Supply Co. v. SCM Corp.*, 415 F.2d 55, 64 (4th Cir. 1969); and the discussion set forth in pages 35-38 of the plaintiffs' Brief.

B. Olsten Used Its Economic Power.

Olsten's discussion apparently concedes the presence in the record of the additional requirements specified in *Fortner Enterprises, Inc. v. U.S. Steel Corp.*, 394 U.S. 495 (1969), as essential for proof of a tie-in. Specifically, the requirements that two separate and distinct items be present, and that a not insubstantial amount of interstate commerce in the tied item be affected, (*Id.* at 497) are not controverted by the defendant. Moreover, Olsten does not directly challenge the indicia of economic power which the plaintiffs argue are present. These include the unique and desirable nature of the Olsten trademark and franchise, and the very fact of the trademark registration. Further indicia include the parties' inequality of bargaining power,

and the existence of a coercive licensing agreement, seemingly legal and enforceable.

Throughout its Brief, Olsten reiterates its proposition that coercion, variously described as "illegal" and "unlawful", is an essential element of a tie-in in restraint of trade. Alternatively, the euphemism "economic pressure" is adopted, qualified by "misused" or "exercised". What is entirely lacking in its consideration is the realization that *any* use of economic power to effect a tying arrangement is illegal. See *Northern Pacific R. R. Co. v. U.S.*, 356 U.S. 1, 5-6 (1958). The proper inquiry is therefore whether Olsten *used* the economic power it possessed because of the desirability of the white collar trademark and franchise to lock Zessos into its blue collar franchise.

The defendant argues at page 34 of its Brief that Zessos has intertwined the use of economic power with evidence of its existence. In fact, the two concepts are closely related. From the presence of the factors plaintiffs discuss above and in their Brief (at pp. 32-38), one can infer the presence of the economic power requirement.

This Circuit recently discussed this relationship in *Coniglio v. Highwood Services, Inc.*, 495 F.2d 1286 (2d Cir. 1974). Therein, Chief Judge Kaufman quoted as controlling the test for coercive power enunciated in *United States v. Loew's Inc.*, 371 U.S. 38, 45 (1962):

> "[T]he crucial economic power may be inferred from the tying product's desirability to consumers or from uniqueness in its attributes". 495 F.2d at 1290.

No better illustration of the desirability and the uniqueness of the plaintiffs' white collar Olsten mark and franchise operation can be found than that employed by Olsten in the "whereas" clauses contained in the preamble to the September 17, 1965 agreement. They make it very clear that Olsten was able to impose the Handy Andy requirements which follow only because of the desirability of the white collar trademark and trade name. The preamble

reads like a textbook example of "economic power" as used in antitrust law:

> " * * *
>
> **WHEREAS,** the LICENSOR possesses the trade name and trademark OLSTEN'S and desires both to increase and expand the use of the same and to maintain the high standards identified with them, and
>
> **WHEREAS,** the LICENSOR has developed various techniques and systems in connection with the aforesaid business, and
>
> **WHEREAS,** the LICENSEE desires an exclusive license to use said trade name, trademark, various techniques and systems and to engage in the business of providing temporary personnel . . .
>
> **NOW, THEREFORE,** be it agreed as follows:
>
> * * * "(A. 19)

It is apparent from this paen by Olsten to the desirability of its white collar trademark and operation that Olsten exploited this economic power as a vehicle for marketing its Handy Andy franchise. It has conditioned the purchase of the white collar franchise on the commitment of the franchisee to operate as a blue collar franchisee exclusively under the Handy Andy mark. It has used its power or leverage in the white collar market to restrain competition in the market for blue collar services.

Significantly, nowhere in the preamble or anywhere else in the licensing agreement is it suggested that Zessos desired a license to use the Handy Andy mark. Nor does it appear that anyone else, including the defendant, considered it to be "desirable".

If, indeed, the defendant was interested in having Zessos as its blue collar as well as its white collar franchisee, there is absolutely no reason why licenses could not have been offered separately and independently. Instead, Olsten meshed the two. Moreover, the illegal tie existed not only at the inception of the agreement but throughout its performance and, by reason of the restrictive covenant (paragraph 26 at A. 31), past its termination. This is hardly

"the mere quiescent possession of economic power, without its use" as suggested by Olsten on page 32 of its Brief.

It is the contention of the plaintiff that it is not necessary to demonstrate "illegal coercion" in addition to "sufficient economic power" to restrain competition. At page 29 of its Brief, the defendant softens the "illegal coercion" language of the District Court and substitutes as a tie-in requirement evidence of "exerting economic pressure". The cases cited in support of this do not support imposition of an "unlawful" or "illegal" coercion requirement as a tie-in element beyond what appears in the present record. To the contrary, the cases demonstrate the appropriateness of finding the existence of a tying arrangement imposed on Zessos by Olsten's licensing agreement.

The first three cases cited by the plaintiffs in support of the above proposition have been discussed extensively in the plaintiffs' Brief, pages 18-23.[4] *Laing v. Minnesota Vikings Football Club, Inc.*, 372 F. Supp. 59 (D. Minn. 1973) has not been followed in this Circuit as to the economic power requirement. *Coniglio v. Highwood*, supra, at 290.

New Amsterdam Cheese Corp. v. Kraftco Corp., 363 F. Supp. 135 (S.D.N.Y. 1973) is not a tie-in case. The plaintiff therein alleged the existence of an intra-company conspiracy to impose an exclusive dealing contract requiring customers to choose between the products of one of two company divisions. The intra-corporate relationship of the alleged "conspirators" precluded finding a conspiracy as well as the requisite foreclosure of competition. However, in discussing the related offense of imposing "tying contracts", the court described precisely the situation and the evil which *is* present in the Olsten agreements:

> "... a seller requires a buyer to purchase an undesired article in order to obtain a desired oftentime patented one. Of necessity this results in the foreclosure of the market to other manufacturers of the undesired article, whose wares may, in fact, be better." *Id.* at 140.

"Foreclosure of the market" in the tied item was not dealt with either by the defendant or the court below in the instant case. Hence, this § 1292(b) appeal. Cf. Plaintiffs' Brief, page 11. The existence of foreclosure is persuasive evidence that Olsten possessed "sufficient economic power" to restrain competition and in fact has done so. Thus, to the extent that *New Amsterdam* is relevant precedent at all, it lends strong support to the plaintiffs' contention.

Refrigeration Engineering Corp. v. Frick Co., 370 F. Supp. 702 (W.D. Tex. 1974) does not assist the defendant. That case relied on the *Northern Pacific* test and found no tying relationship. Id. at 709-710.

E.B.E. Inc. v. Dunkin Donuts, — F. Supp. —, (E. D. Mich. 1974), seems to be inserted in the defendant's Brief principally because it cites the court below in this case. There seems to be a fundamental difference between the instant case and the facts found by the Michigan court. The plaintiff in *Dunkin Donuts* actively sought and desired a single packaged, ready-to-go business operation. On the other hand Zessos sought a single white collar franchise and was required to accept a second franchise.

Recently, in *Coniglio v. Highwood Services, Inc.*, supra, this Court has once again turned to the *Northern Pacific* test to identify the four factors necessary to determine whether an illicit tying arrangement exists. It held that a requirement by the defendant's football team, the Buffalo Bills, that purchasers of regular season tickets also purchase exhibition game tickets, involved a "not insubstantial amount of commerce in the tied market". It further found questions of fact as to product separability and the existence of sufficient economic power in the season ticket market to coerce purchase of the tied exhibition tickets, even though a relatively large quantity of regular season tickets was available on an individual game basis.

[4] *American Manufacturers Mut. Ins. Co. v. American B.-P. Theatres, Inc.*, 446 F.2d 1131 (2d Cir. 1971); *Belliston v. Texaco, Inc.*, 455 F.2d 175, 184 (10th Cir. 1972); *Abercrombie v. Lum's Inc.*, 345 F. Supp. 387, 391 (S.D. Fla. 1972).

The only antitrust factor found missing in *Coniglio* was the absence of an anti-competitive effect in the tied market because there were "neither actual nor potential competitors to the Bills in the professional football market". 495 F.2d at 1291. But for this factor Coniglio would have been entitled to go to trial on his claim. By contrast, in the instant case, it is not contested that competition existed in the market for temporary blue collar employment services, the tied item. (See Plaintiffs' Brief, page 18)

With regard to the economic power factor, it is significant that *Coniglio* does not require direct proof of the actual exercise of overt coercion to establish its existence. Rather, it follows the *Loew's* test, as previously discussed, which permits economic power to be inferred from the tying product's desirability and uniqueness. Indeed, this Court found mere acceptance of the tying arrangement as some evidence of this desirability from which economic power could be inferred:

> "That approximately 23,000 people were 'willing' to purchase season tickets in a stadium that can seat only 46,000, is certainly some evidence of the 'desirability' of these tickets, sufficient at least to persuade us that the existence of the requisite economic power is a triable issue of fact." *Id.* at 1290-1291.

Reversal of the ruling below would be completely in accord with the principles reiterated in *Coniglio*.

III

OLSTEN'S PARTICULAR UTILIZATION OF THE DEVICE OF A TYING ARRANGEMENT RUNS DIRECTLY CONTRARY TO THE PUBLIC POLICY CONSIDERATIONS OF THE SHERMAN ACT.

Olsten is a corporation with nationwide operations which possesses a federally registered trademark, "Olsten's", concededly of value in identification of its business. Under the "Olsten's" mark the defendant has established, by its own description, a well-known system for providing temporary "white collar" personnel to customers throughout the country.

This organization has developed by licensing local franchisees who set up, finance, and operate the local businesses which provide the actual temporary personnel services. Olsten, through the desirability of its "Olsten's" trademark, can attract individuals with the ability to run a successful temporary employment service. Olsten has achieved its market position in the temporary white collar personnel service in part at least, through the use of its "Olsten's" trademark and by seeking out and franchising these local individuals. (See A. 19)

Antitrust concerns arise when Olsten attempts to use its market dominance in the white collar employment service to enter the blue collar employment market. The danger is that Olsten, by licensing together the "Olsten's" and "Handy Andy" trademarks, preempts the very persons who are capable of establishing temporary blue collar employment offices from doing so for themselves or as franchisees of other competitive blue collar services licensors. Such a practice gives Olsten a position in the blue collar market which it has not earned by the inherent value of the Handy-Andy mark or by superior industry, economies of scale, or lower fees. The type of licensing agreement which is the basis of this lawsuit, if allowed to stand, would give a licensor the power to require prospective licensees, who desire to operate under one of several unrelated trademarks, to operate as well under one or more undesirable marks. By such agreements, a licensor forecloses competitors from doing business with his franchisee in the market for the tied goods and services. This is the very evil which the tying prohibitions of the antitrust laws are designated to overcome.

> "The Sherman Act was designed to be a comprehensive charter of economic liberty aimed at preserving free and unfettered competition as the rule of trade. It rests on the premise that the unrestrained interaction of competitive forces will yield the best allocation of our economic resources, the lowest prices, the highest quality and the greatest material progress, while at the same time providing an environment conducive

> to the preservation of our democratic political and social institutions. But even were that premise open to question, the policy unequivocally laid down by the Act is competition. And to this end, it prohibits 'Every contract, combination . . . or conspiracy, in restraint of trade or commerce among the several States'." *Northern Pacific R. R. Co. v. United States, supra*, at 4 and 5.

The license agreement which is the subject of this action restrains Zessos from participating in the competitive market for temporary blue collar employment services as a condition of his white collar license and franchise. It serves no legitimate business purpose. The agreement, in tying the "Handy Andy" license to the "Olsten's" license is anti-competitive. To uphold this type of agreement will serve only to encourage multi-franchise licensors to condition the granting of a desirable franchise on the simultaneous assumption of a separate, less desirable one. It will condone terms and conditions that demand the operation of the tied franchise, guarantee the generation of fees to the licensor, and foreclose competition in the market for the tied services from the licensee and franchisors wishing to do business with the licensee.

IV
CONCLUSION

The plaintiffs respectfully ask the Court to reverse and remand as requested at the conclusion of their original Brief.

Respectfully submitted,
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UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

CAPITAL TEMPORARIES, INC. OF HARTFORD, CAPITAL TEMPORARIES, INC. OF NEW HAVEN AND CONSTANTINE T. ZESSOS,	:	NO. 74-1077
Appellants and Plaintiffs below	:	(United States District Court for the District of Connecticut Civil Action No. 14,749
- against -	:	
THE OLSTEN CORPORATION,	:	
Appellee and Defendant below	:	August 30, 1974

This is to certify that on August 30, 1974 copies of the Reply Brief of the Plaintiffs-Appellants were served upon counsel of record for the Appellee-Defendant by mailing the same to said counsel at their addresses of record as shown below:

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